HH 260-2010
HC 7538/10
Cross Ref: HC 5254/10
Cross Ref: HC 7539/10

ALDRIDGE TIMOTHY FISHER
versus
CHRISTINE FISHER

HIGH COURT OF ZIMBABWE
MTSHIYA J:
HARARE, 25 October 2010, 29 October 2010, 02 November 2010 &
24 November 2010

W.R. Mutasa, for applicant
T.K. Hove, for respondent

MTSHIYA J: This is an urgent chamber application for the following relief:

FINAL ORDER

"1. The execution by the respondent of the default judgment granted by this Honourable Court against the applicant on 14 September 2010 under case number HC 5254/10 be and is hereby stayed pending the final determination of application for rescission of judgment filed under case reference HC 7538/2010.

2. The costs of this application shall be borne by the respondent.

INTERIM RELIEF GRANTED

THAT Pending confirmation or discharge of this provisional order;

1. That the respondent be and is hereby interdicted from executing the default judgment granted by this Honourable Court against the applicant on 14 September 2010 under case number HC 5254/10"

The following is the relevant brief background to the application.

On 14 September 2010 this court granted the following order in favour of the respondent:

"1. Judgment be granted against defendant in the amount of US$23 400-00 together with interest thereon calculated at the rate of 5% per annum from September 2009 to date of payment.

2. Costs of suit".

On 15 October 2010 the respondent's legal practitioners informed the applicant's legal practitioners of the court order in the following terms:-

"Re: OUR CLIENT: CHRISTINE FISHER vs A. FISHER: CASE NO. 5254/10

Please find enclosed herein a copy of the Order that we obtained from the High Court.

Please note that our client is agreeable to your client settling the debt in instalments. To this end, let us have your settlement proposals by return of post.

We trust that it shall not be necessary to instruct the Deputy Sheriff to execute.

Yours faithfully

T.K. Hove
TK HOVE AND PARTNERS"

The applicant's legal practitioners responded to the above letter as follows:-

"We refer to your letter dated 15 October 2010 received at our offices by hand only on 18 October 2010.

We notice that you obtained default judgment in this matter on 14 September 2010 notwithstanding the fact that our client's appearance to defend was entered on 10 September 2010 and served at your offices on 13 September 2010. We are instructed that your client's summons was served on our client only on 08 September 2010 and as such his appearance to defend appears to have been filed timeously. Kindly therefore clarify to us the basis upon which a default judgment was sought and granted.

In addition upon being served with our client's appearance to defend you did not even extend the courtesy of advising that you had already applied for default judgment. Our client certainly intends to defend this claim and has therefore instructed us to apply for a rescission of the judgment and for a stay of execution.

Kindly therefore let us know whether your client is amenable to a rescission of this judgment by consent and to a stay of execution of the judgment in question. The writer tried to call you telephonically this morning but both your mobile phone and office telephone were not answered. We should be pleased if you could let us hear from you in response thereto by close of business today".

On 22 October 2010, fearing that the respondent would proceed with execution as intimated in the letter of 15 October 2010, the applicant filed this urgent application for stay of execution. The application is opposed.

In support of the urgent application the certificate of urgency reads, in part, as foolows:-

> "1. Accordingly it is certain that execution of this default judgment is now imminent when in fact applicant denies being indebted to the respondent in the sums claimed or at all and had entered an appearance to defend the matter on 10 September 2010, being within two days of the date when applicant first saw the summons.
>
> 2 Accordingly should the respondent not be urgently ordered to stay the imminent execution, applicant will suffer irreparable harm as his property will be attached and sold in execution to satisfy a debt which applicant denies and does not even owe to the respondent.
>
> 3. Applicant has, simultaneously with this Urgent Application, filed an application for rescission of the default judgment granted in favour of the respondent on 14 September 2010. Accordingly, it is prudent that execution of this judgment be stayed as a matter of urgency, pending the final determination of the application for rescission of judgment, otherwise the application for rescission of judgment will be rendered only academic.
>
> 4. ……"

The founding affidavit attempts to support the above position in the following manner:-

> "I deny being indebted to the respondent in the sums mentioned or at all. In fact I entered an appearance to defend the main matter on 10 September 2010, that was, within two days of my first sight of the summons. Unbeknown to me, the summons had been served at my business address on 13 August 2010 but my son's friend, Kurt Ruseke, who received the summons inadvertently delayed in forwarding the same to me until 08 September 2010 when he left them in the letter box at my house.
>
> Accordingly, I was not in wilful default. Surprisingly, upon being served with my appearance to defend stating that the summons was served on 08 September 2010, respondent's legal practitioners did not write to me advising the actual date when the summons was served. They did not even warn me to regularise this position and I only discovered the same after being advised of the default judgment on 18 October 2010. It therefore appears that the respondent was bent on snatching the judgment only.
>
> I have simultaneously with this application filed with this Court under case number HC 7538/10 an application for the rescission of the default judgment in question. It is clear that my application for rescission of judgment is *bona fide* and has merits. I was not in

> wilful default and I have a *bona fide* defence on the merits. I beg leave to refer this application".

In her opposing affidavit the respondent points out that the matter should be dismissed with costs for lack of urgency because the applicant has, since July 2010, been always aware of the case. This application, it is argued, was only filed on 22 October 2010 – yet summons was served on 13 August 2010. The respondent goes on to point out that the "applicant did nothing to seriously defend the case and is now only acting because execution is imminent and this does not constitute urgency".

Whilst agreeing that he became aware of the court summons on 8 September 2010 and entered appearance on 10 September 2010, the applicant argues that he only became aware of the final development on 18 October 2010. He then filed this application on 22 October 2010. To that end, the applicant argues, this application was not triggered by the threat of imminent execution. He therefore argued that the principle of law enunciated in the case of *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 H did not apply. In that case it was held that:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is also urgent if, at the time the need to act arises, the matter cannot wait. Urgency, which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. If there has been any delay, the certificate of urgency or supporting affidavit must contain an explanation of the non-timeous action"

Applying the above principles to this application I would reason as follows:

Notwithstanding the issue of entering appearance to defend, I would argue that the need to respond to the judicial process and react timeously arose when the applicant, as he claims, became aware of the litigation on 8 September 2010. The duty to enquire about progress on the matter lay squarely with the applicant who, in any case, admits that his relationship with the respondent had become sour. Faced with litigation, he should have known that the respondent was serious. He did nothing as a follow up to the court process. The need to act timeously had already arisen.

I also find it unconvincing that Kurt Rusike safely kept the summons in his possession from 13 August 2010 until 8 September 2010. The probabilities are that the story is untrue. I find it most unlikely that having kept the summons for almost a month, Kurt Rusike would then, on 8 September 2010, merely drop the summons in a letter box. Given the delay, Kurt

Rusike would have ensured that the summons was personally handed to his friend's father the applicant. He knew he had had it since 13 August 2010.

Given the foregoing I find it difficult to depart from the principles of law laid in the Kuvarega case (*supra*). There is nothing *in casu* to compel me to depart from those principles. This application is in my view triggered by the issue of imminent execution of the default judgment obtained by the respondent on 14 September 2010. The applicant's sudden awakening to stop the inevitable is coming late in the day and cannot therefore enjoy the blessings of this court. There is therefore no urgency in this matter and having so ruled I find it unnecessary to delve into the merits of the matter.

I therefore order as follows:-

The application be and is hereby dismissed with costs for lack of urgency.

Costa & Madzona, applicant's legal practitioners
T.K. Hove & Partners, respondent's legal practitioners